

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION**

BARRY ELLERBEE,

Plaintiff,

v.

Case No. 5:09-cv-159 (HL)

DT CARSON ENTERPRISES, INC.,

a foreign corporation transacting
business in Georgia,

COACHWORKS HOLDINGS, INC.,

a Georgia corporation,

DALE CARSON, individually, and

TERRI CARSON, individually,

Defendants.

ORDER

This matter is before the Court on the Motion to Prevent Entry of Default and Conditionally for Permission to File Untimely Answer or in the Alternative to Set Aside Entry of Default (Doc. 6) (the “Motion”) filed by Defendants DT Carson Enterprises, Inc., Dale Carson and Terri Carson.¹ For the following reasons, the Motion is denied as moot.

The Plaintiff in this case filed his Complaint on April 28, 2009. The Plaintiff alleged that he had perfected service on the Defendants on May 11, 2009. On June 8, the Plaintiff filed a Motion for Default Judgment (Doc.

¹ An involuntary bankruptcy petition was filed against the fourth Defendant, Coachworks Holdings, Inc., on April 7, 2009. Therefore, all proceedings against Coachworks Holdings were stayed by the automatic stay of the Bankruptcy Code. See 11 U.S.C. § 362(a).

3) against the Defendants. The Defendants allege they learned of the default judgment motion on June 10. The Defendants contacted the clerk of this Court to request additional time to respond to the default judgment motion, which the clerk granted. On June 12, the Defendants filed this Motion, in which they raised various issues and challenged the legitimacy of the service and summons. On July 6, the Plaintiff filed his Response to Defendant's Motion to Prevent Entry of Default & Withdrawal of Motion for Entry of Default Judgment (Doc. 8) (the "Withdrawal") wherein the Plaintiff acknowledged that he had failed to obtain summons and serve it with the complaint. The Plaintiff moved to withdraw the default judgment motion and sent the Defendants waivers of summons and complaint pursuant to Federal Rule of Civil Procedure 4(d). The Defendants executed and filed the waivers (Docs. 9 and 10), and filed their Answer (Doc. 11) on August 25, 2009.²

Because of the foregoing, the issues raised in the Motion are moot. Therefore, the Motion (Doc. 6) is denied.

² On October 30, 2009, the Plaintiff filed a Notice of Relief from Automatic Stay (Doc. 16), wherein the Plaintiff notified the Court that the bankruptcy court entered an order on October 16 granting stay relief to allow the Plaintiff to proceed with his claims in this Court. On October 30, the Plaintiff filed a Waiver of Service (Doc. 15) signed by Coachworks Holdings, and on December 21, Coachworks Holdings filed a Motion to Dismiss the Complaint (Doc. 17) in lieu of an answer.

SO ORDERED, this the 14th day of January, 2010.

s/ Hugh Lawson

HUGH LAWSON, Senior Judge

jch